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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 533.

DUPARQUET HUOT & MONEUSE CO., E. E. ALLEY CO., INC., and H. B. DAY CO., INC.,

Petitioners,

vs.

FRYSINGER EVANS, DU-WEL CLEANING CONTRACTING CO., GREENLEIGH PRINTING CO., INC., and GRAMERCY QUALITY LAUNDRY CO., INC.

BRIEF FOR PETITIONERS.

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BRIEF FOR PETITIONERS.

Statement.

This court on November 25, 1935 (R., 23), granted certiorari to the Circuit Court of Appeals for the Second Circuit, which on July 22, 1935 (R., 21-22), had affirmed an order of the District Court for the Southern District of New York, dated May 13, 1935 (R., 12-13), dismissing as insufficient in law the petition of three creditors for the reorganization of a corporate debtor under § 77B of the Bankruptcy Act.

The opinion of the District Court (Knox, D. J.), dated May 8, 1935 (R., 10-11), is reported 11 Fed. Supp. 404,

and that of the Circuit Court of Appeals (Swan, C. J.), dated July 15, 1935 (R., 17-21), is reported 78 Fed. [2d] 678. The jurisdiction of this court was invoked under subdivision (a) of § 240 of the Judicial Code (28 U. S. C. 347).

The cause involves the construction of subdivisions (a) and (i) of § 77B of the Bankruptcy Act (11 U. S. C. 207), the material portions of which are set forth in the appendix.

The question is whether possession of the corporate debtor's property by receivers appointed in a suit in equity to foreclose a real estate mortgage is an "equity receivership" within the meaning of subdivision (a) of § 77B of the Bankruptcy Act. As the District Court dismissed the petition for reorganization upon motion without a hearing on the merits, only the allegations of the petition are relevant.

THE PETITION FOR REORGANIZATION.

The petitioners below were three unsecured creditors of the debtor who had provable claims amounting in the aggregate, in excess of the value of securities held by them, to more than $1,000 (R., 1-3). Their petition alleged that the debtor was eligible to bankruptcy under § 4 of the Bankruptcy Act (R., 1); that during the six months preceding the debtor had had its principal place of business in the Southern District of New York (R., 3); that it was unable to meet its debts as they matured (R., 3); that petitioners proposed that the debtor should effect a reorganization under § 77B (R., 3), and that no prior proceeding was pending for the relief sought (R., 5).

The petition also contained, among others, the following allegations (R., 3):

> "Heretofore and on or about October 15, 1934, by the service of a summons and complaint and the filing of a lis pendens, an action was commenced in the Supreme Court of the State of New York, County of New York, by Gertrude C. Buttenweiser against the debtor, to foreclose a mortgage in the principal

sum of $42,500 held by the said Buttenweiser on the property of the said debtor. The complaint in said action alleged the debtor's default in payment of interest on said mortgage, which said mortgage matured on September 19, 1934. Thereafter, and on or about December 19, 1934, by order of said Supreme Court receivers of the said property of the said debtor were appointed in said action. Said receivers entered into possession of and now hold the said property and are receiving and administering the income therefrom for the benefit of the said plaintiff in said action. Said receivership is now in full force and effect and has not been revoked or terminated."

And (R., p. 4):

> "The debtor is unable to meet its matured and maturing obligations. It has defaulted in the payment of interest and principal upon a mortgage in the amount of $42,500, which matured on September 19, 1934. The total value of its assets taken at values reflected by current market conditions, exceeds the total amount of its liabilities, but said value cannot be immediately realized without great sacrifice. *Its only property is being administered by receivers in the foreclosure action hereinbefore mentioned.* Other creditors of the corporation are pressing for payment of their respective claims. The debtor is in arrears in New York municipal taxes approximating $260,000" (Italics ours).

The petition further alleged that the assets of the debtor were of great value (R., 4); that the property of the debtor formerly secured a mortgage in the amount of $1,650,000, and that its assessed valuation exceeded $1,500,000 (R., 5); that, under present market and financial conditions, a forced sale would cause unnecessary loss to lienors, creditors and others in interest; that the debtor maintained and operated on the premises the hotel "Manhattan Towers"; that the debtor's business was in serious danger of deterioration and loss by virtue of the pending foreclosure action and the pressure of other creditors; that if a plan of reorgani-

zation could be effected it would result in a great saving of the assets of the debtor which would redound to the benefit of its creditors and stockholders (R., 4); that if the debtor's assets were safely conserved and managed, they would ultimately be sufficient to satisfy all creditors in full (R., 5); that it was essential for the protection of the interests of the stockholders and creditors that a forced liquidation of the debtor's assets be avoided, and all creditors be restrained from prosecuting their claims except in the reorganization proceedings; that such a liquidation would be accomplished if the foreclosure action should result in a sale pursuant to the judgment to be obtained in that action; and that the property if sold at this time would bring but little to the estate because of the present depression in the real estate market (R., 5).

The petition concluded with the prayer that the court approve the petition, assume jurisdiction and appoint a trustee, and that petitioners be permitted to submit a plan for reorganization (R., 5-6).

A schedule annexed to the petition, which only purported to be an approximation, showed assets of $1,500,000 and liabilities of $392,385.04 (R., 7).

QUESTION.

The petition did not allege that the debtor had committed an act of bankruptcy within four months, nor that a prior proceeding in bankruptcy was pending. It did allege that the debtor's property was in custody of receivers appointed by the state court in a suit in equity to foreclose a mortgage. The sole question presented is whether this constituted an "equity receivership * * * pending," which is an alternative requirement of § 77B.

The Circuit Court of Appeals is in agreement as to the question presented. It said (R., 18):

> "Upon motion of other creditors of the debtor corporation the District Court dismissed the petition

on the ground that a mortgage foreclosure suit, in which receivers have been appointed, is not an 'equity receivership' within the meaning of Section 77B. The correctness of this construction is the sole question presented."

DISTINCTION FROM OTHER CASES.

The present case differs from *In re Granada Hotel Corporation* (7th C. C. A. June 5, 1935, rehearing denied July 26, 1935) 78 Fed. [2d] 409, which is before this Court *sub nomine Tuttle* v. *Harris,* No. 428, in that in the present case receivers of the court's own selection were in charge at the filing of the petition, whereas in the *Granada* case, prior to the filing of the petition under § 77B, the state court had discharged the receiver appointed in a suit to foreclose the second mortgage and had placed the first mortgage trustee in possession of the property under the terms of the trust deed. The Seventh Circuit Court of Appeals *sustained* the creditors' petition for reorganization.

The present case differs from *In re Broadway-Barclay Corporation* (2d C. C. A. July 15, 1935) 78 Fed. [2d] 680, decided by the court below simultaneously with its decision herein, in that receivers had actually been appointed and taken possession in this case, whereas in that case a foreclosure action was pending but no receivers had been appointed. It differs in the same respect from *In re Laclede Gas Light Co.* (D. C., E. D. Mo. June 26, 1934, not officially reported) C. C. H. Bankruptcy Law Service, Paragraph 3001.

Specifications of Error.

1. The Circuit Court of Appeals for the Second Circuit erred in affirming the order of the District Court which dismissed the petition for reorganization as insufficient in law.

2. The said Circuit Court of Appeals erred in holding that custody of the debtor's property by receivers appointed

by a state court in a suit in equity to foreclose a mortgage was not an "equity receivership" within the meaning of subdivision (a) of § 77B of the Bankruptcy Act.

ARGUMENT.

The custody of the debtor's property by receivers appointed by the state court in a suit in equity to foreclose a mortgage is a pending equity receivership within the meaning of Section 77B of the Bankruptcy Act.

SUMMARY

The words "equity receivership" are clear and unambiguous and have a definite legal meaning which includes a receivership in mortgage foreclosure. Judicial limitation of the expression "equity receivership" to receiverships in so-called "conservation suits" is not warranted. If the canons of construction are summoned, they require that statutory language be given the widest and not the narrowest significance, and that the legal meaning rather than any merely colloquial or local meaning be attached. Indeed, it may well be said that the language is so plain as not to be open to construction and, under well settled principles, it cannot be denied or limited unless the literal or legal meaning leads to impractical or absurd results.

The suggestion that a small part only of the debtor corporation's property may be affected by a foreclosure receivership and its financial position not at all, is met by the additional requirements for a creditor's petition that the corporation must be insolvent or unable to meet its debts as they mature, and that the petition must be filed in good faith.

To the contention that the debates in Congress show that it was receivership in "conservation suits" which indi-

vidual legislators contemplated, it may be answered that there is nothing in those debates to show that the Congress intended to *limit* the generality of "equity receivership" to receiverships in this particular type of suit, and in any event the language of the statute must be accepted as the final expression of legislative intention.

The association of "equity receivership" in the statute with "a prior proceeding in bankruptcy," does not require the assimilation of "equity receivership" to a bankruptcy proceeding. There is no such thing as "a proceeding in equity receivership," and a solecism may not be attributed to Congress merely for the purpose of creating an ambiguity where none would otherwise exist. The expressed purpose of the statute, and its association with other statutes designed to relieve depression and promote economic recovery, stamp it as remedial in character and require liberal interpretation. No legislative purpose can be discerned in excluding from reorganization at the behest of creditors the many solvent real estate corporations as to which a mortgage foreclosure receivership rather than a "conservation" receivership is characteristic of business distress.

POINT I.

The language of the statute imperatively requires that the present receivership be held an equity receivership.

A. The present pending foreclosure receivership satisfies the literal requirements of the statute.

Under subdivision (a) of § 77B three creditors having claims in the jurisdictional amount may file a petition under the section, if the corporation is insolvent, or unable to meet its debts as they mature, in any one of three alternative situations: (1) if the corporation has committed an act of bankruptcy within four months, (2) if a prior pro-

ceeding in bankruptcy is pending, and (3) if an equity receivership is pending.

Clark on Receivers thus defines the term "equity receiver" (2d Ed. 1929) § 713.

> "Equity or Equitable Receiver of Corporation.
>
> * * * *
>
> "The term equity or equitable or chancery receiver in its generally accepted sense means an officer appointed by the court to hold property in litigation pending suit or at times to hold property after judgment."
>
> * * * *

The expression "equity receivership * * * pending," which governs this case, is not difficult or obscure. If the words are read in their literal significance, the logical content of the phrase cannot include more than this: (1) appointment of receivers in a suit in equity, (2) appointment of receivers by an exercise of chancery rather than statutory powers, and (3) present possession of the *res* by the receivers. While it may very well be that the statute is satisfied by the existence of less than all of these conditions, it cannot be said without a violation of language that custody of the property of a corporation by a receiver appointed in an exercise of chancery powers in a suit in equity is not an equity receivership.

It cannot be doubted that a suit to foreclose a mortgage is a suit in equity. The appointment of receivers in such a foreclosure suit is the exercise of chancery powers. *New York Title & Mtge. Co.* v. *Polk Arms, Inc.,* (1933) 262 N. Y. 21.

It is said in Carmody's New York Practice, Vol. 8, § 1023:

> "Receivers may be appointed in foreclosure actions, but, if appointed, they are the regular equity receivers."

The author refers the reader by a footnote to Vol 7, § 584, where it is said:

> "These receivers were appointed by the courts of chancery before any statutes were passed authorizing their appointment, and the cases in which such receivers might be had and the rules regulating their appointment and governing their conduct were well settled before the Code of Civil Procedure was adopted in 1849. The Code provisions merely codified those well-established rules, and the Civil Practice Act sections continue the law as found in the Code."

The petition alleged in the present case that the receivers have entered into possession, that the receivership is now in full force and effect and has not been revoked or terminated (R., 3), and that the debtor's "only property" is being administered by the receivers in the foreclosure suit (R., 4).

The receivership in this New York foreclosure suit thus meets all of the possible requirements of the language used in the statute.

B. The language of the statute is unambiguous and does not admit of construction.

The court below has obviously added restrictions to the legal concept of an equity receivership by an exercise of a purported power to construe the statute. The statute, however, being unambiguous, has left no room for construction.

In *United States* v. *Mo. Pac. R. Co.* (1929), 278 U. S. 269, this Court in refusing to cut down the effect of general language employed in the Interstate Commerce Act, which was contended to have a more restricted meaning, said (p. 277):

> "Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that

> resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction."

And again (p. 278):

> "But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended."

As it was put by Sutherland, J., in *Crooks* v. *Harrelson* (1930), 282 U. S. 55, 60:

> "* * * the absurdity must be so gross as to shock the general moral or common sense. Compare *Pirie* v. *Chicago Title and Trust Company,* 182 U. S. 438, 451-452. And there must be something to make plain the intent of Congress that the letter of the statute is not to prevail. *Treat* v. *White,* 181 U. S. 264, 268."

C. Where words of general application are used the general meaning is preferred to a restricted meaning.

Even if it be agreed that the words "equity receivership * * * pending" are subject to interpretation, the applicable canons of construction are opposed to the restriction sought to be made.

The rule that the wide is preferred to the narrow construction finds expression in *Mears Mining Co.* v. *Maryland Casualty Co.,* (1912) 162 Mo. App. 178, 144 S. W. 883, 887; *Tynan* v. *Walker,* (1868) 35 Calif. 634, 642; *Abbot* v. *City of Milwaukee, et al.,* (1912) 148 Wis. 26, 134 N. W. 137, and *So. Ry. Co.* v. *Machinist Local Union No. 14,* (C. C. W. D. Tenn. 1901) 111 Fed. 49, 56, 57.

The matter was thus put by the Supreme Court in *Miller* v. *Robertson,* (1924) 266 U. S. 243, 250, in holding, per Butler, J., that suits under § 9 of the Trading with the Enemy Act were not to be limited to causes of action for which an action of debt might be maintained:

> "The words of a statute are to be read in their natural and ordinary sense, giving them a meaning to their full extent and capacity, unless some strong reason to the contrary appears."

Caffey, J., said in *In re David Bell Scarves* (D. C. S. D. N. Y. 1931), 52 Fed. [2d] 755, 756; affirmed as *Conrad* v. *Pender*, 289 U. S. 472:

> "There must be plain and strong ground for depriving language of a statute of full operation before the court is justified in confining it to a field more restricted than that comprehended within the literal words."

D. The legal meaning of the words used is to be preferred to a colloquial or local meaning.

Judge Swan, writing for the court below, says of the words "equity receivership" (R., 19):

> "The kind of suit to which those words are usually applied in common parlance is one commenced by a simple contract creditor praying for the conservation of the assets of a corporation insolvent in the common law sense, in which the corporation confesses the allegations of the bill and consents to the appointment of a receiver."

The reference of the court is to the "conservation" suit which, based upon an equitable estoppel upheld in *Brown* v. *Lake Superior Iron Co.* (1890), 134 U. S. 530, received a certain amount of judicial recognition in *Re Metropolitan Railway Receivership* (1908), 208 U. S. 90, was condemned as irregular in *Harkin* v. *Brundage* (1928), 276 U. S. 36, was treated as a legitimate object of suspicion in *Shapiro* v. *Wilgus* (1932), 287 U. S. 348, 356, and is mentioned as a suit in which an equity receiver may be appointed in *Gordon* v. *Washington* (1935), 295 U. S. 30.

But the use of the words "equity receivership" as limited to this irregular and eccentric type of proceeding in

the federal courts is obviously a colloquialism. Furthermore, as pointed out in the case of *In re Laclede Gas Light Co.* (D. C., E. D. Mo. 1934 not officially reported) C. C. H. Bankruptcy Law Service, Par. 3001, this type of proceeding, except as to railroads, has been limited to the eastern seaboard. Words having a definite legal significance when used in a statute of national application should not be assigned a colloquial meaning, and still less a meaning unknown in a portion of the country over which the statute is to operate.

As was said in *Westerlund* v. *Black Bear Mining Co.* (8th C. C. A. 1913), 203 Fed. 599, 605:

> "A decisive canon of construction here, however, is that when a word which has a known legal meaning is used in a statute it must be assumed that the term is used in its legal sense, in the absence of an indication of a contrary intent. *The Abbotsford,* 98 U. S. 440, 444, 25 L. Ed. 168; *McCool* v. *Smith,* 1 Black (U. S.) 459, 464, 470, 17 L. Ed. 218; *United States* v. *Gilmore,* 8 Wall. 330, 19 L. Ed. 396."

POINT II.

The reasons of the Court below for rejecting the literal and legal meaning of the words "equity receivership * * * pending" are invalid.

A. Resort to the Congressional debates is improper.

The learned court below concedes that it is rejecting the literal meaning of the statute and accepting a colloquial one. It says (R., 19):

> "It cannot be gainsaid that an action to foreclose a mortgage is a suit in equity, or that the receiver appointed in such a suit to conserve the mortgaged property and collect the rents pending foreclosure may properly be called a receiver in equity."

Nevertheless, the Court limits the generality of the statute to the equity receivership found in a single type of proceeding, the "conservation suit", because "the debates in Congress during the progress of the bill, although not affording any conclusive evidence of the meaning of the words in question, indicate that the legislators were thoroughly familiar with this type of receivership. See 78 Cong. Rec., 7890, 7905-7" (R., 20).

It is no doubt true that some of the legislators at least were thoroughly familiar with the "conservation suit", although this does not appear from the particular references to the Congressional Record made by Judge Swan. The Congressional Record will be searched in vain, however, for any indication that the legislators intended to *limit* the generality of the words "equity receivership" to receiverships in "conservation suits." The words "and, if a prior proceeding in bankruptcy or equity receivership is not pending," were added by amendment in the Senate on May 2, 1934, at the motion of Senator Hastings, after the bill had been reported out of committee, and were agreed to without objection or debate (78 Cong. Rec., 7889). Nor does it appear that they were subsequently discussed.

But resort to such an external source for the meaning of words which are unambiguous and have an accepted legal significance is a violation of the rule established by decisions of this Court. *Caminetti* v. *United States* (1917) 242 U. S. 470, 490; *Pennsylvania Railroad Company* v. *International Coal Company* (1913) 230 U. S. 184, 199; *United States* v. *Freight Association* (1897) 166 U. S. 290, 318; *United States* v. *Mo. Pac. R. Co.* (1929) 278 U. S. 269, 278.

The following extract from the opinion of McKenna, J., in *Mackenzie* v. *Hare* (1915) 239 U. S. 299, 308, is most pertinent:

> "It would transcend judicial power to insert limitations or conditions upon disputable considerations of reasons which impelled the law, or of conditions to which it might be conjectured it was addressed and intended to accommodate.

> "Whatever was said in the debates on the bill or in the reports concerning it, preceding its enactment or during its enactment, must give way to its language, or, rather, all the reasons that induced its enactment and all of its purposes must be supposed to be satisfied and expressed by its words, and it makes no difference that in discussion some may have been given more prominence than others, seemed more urgent and insistent than others, presented the mischief intended to be remedied more conspicuously than others."

B. The argument that the equity receivership contemplated is only such as is similar to a proceeding in bankruptcy is invalid.

The language is "if a prior proceeding in bankruptcy or equity receivership is not pending, that it has committed an act of bankruptcy within four months" (Subd. a, § 77B).

(1) The Circuit Court of Appeals (R., 20), as did the District Court (R., 11), rested its decision upon the supposed use of the words for interpretation in apposition to "a prior proceeding in bankruptcy." The word "prior", however, modifies "proceeding in bankruptcy" alone. Its use obviously is to distinguish between an earlier bankruptcy proceeding and the reorganization proceeding itself, which, being brought under the bankruptcy act, is also a "proceeding in bankruptcy."

There is, moreover, no such thing as "a *proceeding* in equity receivership." A suit that looks merely to the appointment of an equity receiver must be dismissed. *Gordon* v. *Washington* (April 1, 1935) 295 U. S. 30, 70 L. Ed. 626; *U. S.* v. *Sloan Shipyards* (D. C. W. D. Wash. N. D. 1920) 270 Fed. 613; *Central West Public Service Co.* v. *Craig* (8th C. C. A. 1934) 70 Fed. [2d] 427, 432; *Zuber* v. *Micmac Gold Mining Co.* (C. C. Me. 1910) 180 Fed. 625, 627.

In the case first cited this Court said, per Stone, J. (p. 37):

> "A receivership is only a means to reach some legitimate end sought through the exercise of the power of a court of equity. It is not an end in it-

> self. Where a final decree involving the disposition of property is appropriately asked, the court in its discretion may appoint a receiver to preserve and protect the property pending its final disposition."

In the *Central West* case, *supra*, the Eighth Circuit Court of Appeals said (p. 432):

> "The appointment of a receiver is an ancillary, an incidental remedy only, and is not final relief nor is it properly the end or object of the litigation, but is a remedy allowable only in connection with a suit pending for some other purpose in which there is a prayer for ultimate relief which the court has jurisdiction to grant, and to which the appointment of the receiver is an aid."

Equity receiverships do not differ as between themselves. They can only be classified with reference to the primary objects of the bills to which they are auxiliary, and to the ultimate relief sought. While the order appointing one receiver may give powers denied to another for the purpose of accomplishing some object of the suit, or some necessity of the situation, there is no "quality" (to use the language of the District Court, R., 10) possessed by one receiver that is not possessed by all. They all hold the *res pendente lite* for the ultimate determination of its disposition by the court.

Hence the word "proceeding" cannot be attached to the words "equity receivership", and it cannot be said that the statute is limited to "a prior proceeding in equity receivership" which is to be assimilated to "a prior proceeding in bankruptcy". The only words to be interpreted are "equity receivership • • • pending".

(2) The court below said (R., 20): "The appointment of a receiver in foreclosure proceedings is not an act of bankruptcy." This is quite an irrelevant observation. If an act of bankruptcy has been committed, there is no necessity for alleging the pendency of an equity receivership. The legislature can hardly be presumed to have intended

the phrase "equity receivership * * * pending" to be merely co-extensive with the receivership defined as an act of bankruptcy.

The statement of the court below quoted above, however, finds support only in a dictum in *Standard Accident Insurance Co.* v. *Sheftall & Co.* (5th C. C. A. 1931) 53 Fed. [2d] 40, 41, which indeed the court below cites. The receivership in that case, however, was not in the course of a suit for the ratable distribution of the corporation's assets nor for the winding up of its affairs, but was a suit by a judgment creditor to enforce the lien of his judgment upon the corporation's assets for his own exclusive benefit, and it was held that the appointment of a receiver in such case, the defendant being insolvent, was an act of bankruptcy. The "quality" of that receivership was not different from the one at bar, where a mortgagee seeks to subject the corporation's property to the lien of her mortgage. Indeed, a receivership in a suit of the "conservation" type originally could not have constituted an act of bankruptcy. The bills in such suits always allege solvency, but inability to meet debts as they mature. On the other hand, from 1903, when it was first established as an act of bankruptcy, until the act of May 27, 1926, § 3 of the Bankruptcy Act required the appointment of the receiver, in order to constitute an act of bankruptcy, to have been made "because of insolvency". This involved a judicial determination of insolvency. *Walker* v. *Morgan & Bird Gravel Co.* (5th C. C. A. 1927) 20 Fed. [2d] 547.

By the amendment of 1926, the words "because of insolvency" were eliminated, but the words "while insolvent" remained, and the question then arose whether the corporation was in fact insolvent at the time of the appointment, although the creditor had alleged, and the corporation had admitted that it was not. See *In re Luxor Cab Manufacturing Corporation* (2d C. C. A. 1928) 25 Fed. [2d] 644. It would be quite wrong, however, to assert that at any time

it was essential that the receivership be in a suit of any particular type. Such receiverships were in suits of various kinds. For example, the appointment of a receiver in a suit to remove cloud on title was held to be an act of bankruptcy in *Petition of France Foundry & Machine Co.* (D. C. E. D. Mich. S. D. 1921) 276 Fed. 757, 758.

Recently, a state court receivership in a suit by the state to foreclose a tax lien upon the property of the corporation, which "on its face covered all the property of the company", was held, in view of the insolvency of the corporation, to be an act of bankruptcy in *In re White Star Refining Co.* (5th C. C. A. 1935) 74 Fed. [2d] 269, 272.

The case of *Schmidtman* v. *Atlantic Phosphate & Oil Corp.* (2d C. C. A. 1916) 230 Fed. 769, cited by the District Court below, merely held that it would not construe § 9 of the New York Labor Law, providing for priority of wage claims "upon the appointment of a receiver", to mean a priority that would displace the lien of a prior mortgage, and the court said that express language would be required to show such a legislative intent. It is a far cry to assert that that case is authority for limiting "equity receivership" as used in § 77B.

(3) The Court below said (R., 20):

> "The canon of *ejusdem generis* is applicable. Bankruptcy looks to a liquidation of assets and an equitable distribution among creditors. So also does an equity receivership in a 'conservation suit'."

Of course, the principle of *ejusdem generis* is only an aid to construction and is not to be used unless a genuine ambiguity exists. *Mason* v. *United States* (1922) 260 U. S. 545, 554; *Goldsmith* v. *United States* (2d C. C. A. 1930) 42 Fed. [2d] 133, 137.

The court, however, was entirely mistaken in supposing that this was a case where the principle *ejusdem generis* was capable of application.

The canon is thus stated by Manton, C. J., writing for the Second Circuit Court of Appeals in *Goldsmith* v. *United States, supra,* (p. 137):

> "The rule of ejusdem generis means that, where a general term in the statute follows specific words of a like nature, it takes its meaning from the latter, and is presumed to embrace the persons or things of the kind designated by the specific words."

The statute, § 77B(a) Bankruptcy Act (11 U. S. C. § 207 (a)), provides "if a prior proceeding in bankruptcy or equity receivership is not pending" the petitioning creditors must allege an act of bankruptcy within four months.

"Bankruptcy" has a comprehensive and definite connotation. It is a proceeding provided for in the constitution of the United States. Its administration is directed by the statutory enactments of Congress.

"Equity receivership" is the creation of the court of equity, conceived and administered through the exercise of its inherent powers to supply a remedy for any applicant who cannot be properly protected before a court of law. Its origin and development were prior to, and entirely separate from that of bankruptcy.

Equity receivership and bankruptcy each "exhaust the genus". *Mason* v. *United States, supra* (p. 554).

The use of the canon *ejusdem generis,* moreover, is limited to the interpretation of the general expression which follows the particular. Examples are found in *Mason* v. *United States, supra* (pp. 553-554) ("other form of appropriation"); *Mid-Northern Co.* v. *Montana* (1924) 268 U. S. 45, 49 ("other rights"); *United States* v. *Standard Brewery* (1919) 251 U. S. 210 ("other intoxicating * * * liquor") and *Goldsmith* v. *United States, supra,* ("other writing").

Here there are two mutually exclusive specific expressions followed by *no general expression whatsoever.* With due respect, the canon is simply not applicable.

C. The receiver in the "conservation suit" does not differ in kind from the receiver in a mortgage foreclosure suit.

The interpretation of the Circuit Court of Appeals strictly limits the "equity receivership" of the statute to a receivership in a suit of the "conservation" type (R., 19). This is somewhat narrower than the construction of the District Court which thought that "the 'equity receivership' contemplated by Section 77B is of much wider scope than that which frequently accompanies foreclosure proceedings; for example, a general receivership, *or* one such as characterized the so-called 'conservation suits'" (R., 10, italics ours).

The respondents here contend that the receivership may be in a federal, state or territorial court, provided it came into existence because the corporation was unable to meet its debts as they matured (Brief in opposition to certiorari, p. 14).

The corporation does not come to an end when a "general receiver" is appointed. *Chemical Bank* v. *Hartford Deposit Co.* (1896) 161 U. S. 1, 4. The "general" receiver does not receive the corporate franchise. For some purposes the corporation may still function through its board of directors. *No. Pac. Ry. Co.* v. *Frank Waterhouse & Co.* (D. C. W. D. Wash. 1922) 279 Fed. 750, 751; *Johnson* v. *Southern Building & Loan Association* (C. C. W. D. Va. 1899) 99 Fed. 646, 649.

The "general receiver", then, like the foreclosure receiver, is merely a receiver of corporate property. Where is the line to be drawn? The foreclosure receiver may, it is true, receive only a portion of the corporation's property or, as in the present instance, he may receive it all (R., 4). The "general receiver" may receive all of the corporation's property, or he may receive only a small part of it, as in the case of a chain store corporation where its principal office is in the district of the receivership and most of its stores are scattered throughout other states.

The essential sameness of the receivership function is well illustrated by the fact that where a "general receiver" has been appointed and a mortgagee has been permitted to proceed to foreclosure, the receiver first appointed has been authorized to collect the rents for the benefit of the mortgagee, as would be done by a foreclosure receiver. *Bankers Trust Co.* v. *Missouri, K. & T. Ry. Co.* (8th C. C. A. 1918) 251 Fed. 789, 792; *Continental Trust Co.* v. *Toledo St. L. & K. C. R. Co.* (C. C. N. D. Ohio W. D. 1897) 82 Fed. 642; *Clark, Receivers* (2d Ed.) § 1133. The powers of a mortgage foreclosure receiver were extended to that of a general receiver in *Equitable Trust Co.* v. *A. C. White Lumber Co.* (D. C. D. Idaho, N. D. 1930) 41 Fed. [2d] 60, 63.

The case of *Bryan* v. *Welch* (10th C. C. A. 1935) 74 Fed. [2d] 964, certiorari denied 295 U. S. 748, is definitely in conflict with the opinion below in so far as the latter seeks to confine "equity receivership" to suits of the "conservation" type. In that case a creditor's petition for reorganization under § 77B was entertained against Imperial Royalties Company, a common-law trust. The court said, per Phillips, C. J. (p. 970):

> "The amended petitions of intervention filed by Agee and others, Brinstad and others, and Manley and others, and the amended petition filed by Welch and others do not allege an act of bankruptcy within four months, but each of them alleges the pendency of the prior state court receivership. Was it an equity receivership? The grounds alleged for the appointment of a receiver were mismanagement, waste and dissipation of assets, and fraud on the part of the trustees. The receiver was authorized to take possession of all the assets, and the books and records of the Royalties Company, and to enforce and prosecute claims in its favor, to collect moneys due it, and to defend claims and suits against it, and generally to manage, preserve and protect its assets and business. Dissolution or termination of the trust was not contemplated.

"A court of equity by virtue of its general equitable jurisdiction at a suit of a stockholder on the ground of fraud, mismanagement, waste and dissipation of assets by the corporate officers, may appoint a receiver for the corporation to collect, protect, and preserve its assets and to continue its business, and thereafter, when there has been a change of corporate officers or it appears prudent so to do, may restore its property and affairs to its duly constituted corporate authorities.

* * * * * * *

"We conclude that the state court receivership was an equity receivership within the meaning of section 77B."

It may be observed with respect to the receivership held an equity receivership in the foregoing decision that, (1) it was a state court receivership; (2) it was not of the "conservation type"; (3) the receiver was not appointed because of alleged inability of the debtor to meet its debts as they matured, but to prevent waste; (4) the statute did not contemplate the winding up of the debtor and the distribution of its assets, but the restoration of its property to the debtor when there had been a change of corporate officers; and (5) the suit bore no resemblance whatever to a proceeding in bankruptcy.

The receivership to prevent waste of corporate assets is, of course, closely akin to a receivership of land for the protection of the remaindermen against the life tenant or other holder of the particular estate, or for the protection of the mortgagee against the mortgagor. 4 Pomeroy, Eq. Jur. (4th Ed. 1919) § 1334 pp. 3196-3199.

Bryan v. *Welch*, therefore, is directly opposed not only to the decision of the court below but to the theories of the District Court and of the respondents here as well. Certainly, it aligns the Tenth Circuit with the Seventh Circuit in opposition to the decision of the Second Circuit under review.

D. Adherence to the legal and literal meaning of the statute does not lead to absurd and impractical consequences.

This is the only exigency in which departure from the accepted meaning of the statute's terms is permissible. *United States* v. *Mo. Pac. R. Co.* (1929) 278 U. S. 269; *Chicago Home for Girls* v. *Carr* (1921) 300 Ill. 478, 483, 133 N. E. 344, 346-347.

"The absurdity must be so gross as to shock the general moral or common sense." *Crooks* v. *Harrelson* (1930) 282 U. S. 55, 60.

There is, however, only one suggestion in the opinion below that the acceptance of the literal and legal meaning of the words used by the legislature produces an impractical result.

The opinion below argues (R., 20):

> "We cannot think that Congress intended to give three creditors having claims totaling as little as $1,000, the right to force a corporation into a reorganization, if a receiver were appointed in the foreclosure of a mortgage covering any of its property. Situations may well be imagined in which a corporation might allow a mortgage on part of its land or on a chattel to be foreclosed, with the appointment of a receiver pending foreclosure, without being in any need of a reorganization. We do not believe that it was the purpose of Congress to permit every foreclosure proceeding in which a receiver might be appointed to be superseded by an involuntary reorganization."

This argument, however, completely ignores other provisions of the statute. If "equity receivership" is given its literal and legal meaning, that does not permit "every foreclosure proceeding in which a receiver might be appointed to be superseded by an involuntary reorganization." Such a result can follow only if the corporation is (1) insolvent, or unable to meet its debts as they mature, and (2) if the petition is filed in good faith (Section 77B, subd. (a)). With these safeguards against the haphazard

or unscrupulous use of the involuntary petition for reorganization, there is no reason why the right to file such a petition should not follow the existence of a mortgage foreclosure receivership. The foreclosure of any portion of a corporation's property is usually a symptom of financial distress. When accompanied by the corporation's insolvency or inability to meet its debts as they mature, the creditors of the corporation should be permitted to avert the disaster and set in motion the machinery of reorganization. They should not be left to the mercy of the debtor's own board of directors which through deadlock, lack of direct interest, ulterior motives or mere indolence, may be unable or unwilling to help them. At least the existence of such a remedy is not so absurd "as to shock the general moral or common sense".

The necessary effect of the decision below is to exclude from relief and reorganization under § 77B of the Bankruptcy Act at the instance of creditors practically all corporations the activities of which are limited to holding or operating real estate (unless the corporation is actually bankrupt), since in the case of such corporations the receivership which accompanies financial distress is almost invariably a foreclosure receivership. This is an actuality, and is a result far more unjust and absurd than the supposed case put by the court below.

POINT III.

The statute furnishes its own definition of "equity receivership * * * pending," which is in accord with the literal meaning and full operation of those words.

Subdivision (i), quoted in the Appendix, provides expressly that a petition may be filed under this section by the corporation's creditors "as provided in subdivision (a) of this section," "if a receiver or trustee of all *or any part* of the property of a corporation has been appointed by a

federal, state or territorial court." This language is also plain and unambiguous, and affords to the creditors a right to petition under the section: (1) whether the appointment is over all, or only a part of the property, and (2) whether the appointment is by a federal, state or territorial court. This plain language precludes the interpretation that the appointment of a receiver of the property in foreclosure is not within the statute, or that the statute must be limited to a receivership pending in the federal court.

True, the petition may be filed "as provided in subdivision (a)." The fair interpretation of this phrase is that to the requirement of the "pending" receivership, defined by this subdivision, must be added the other requirements of subdivision (a), to wit: that the creditors shall be three in number, that their claims aggregate $1,000, and that the corporation shall be either insolvent or unable to meet its debts as they mature. It cannot be said that the provision that a petition may be filed "as provided in subdivision (a)" also requires the allegation of an act of bankruptcy, or the existence of a prior proceeding in bankruptcy, or of the pendency of an equity receivership other than as defined in subdivision (i). The words quoted above from subdivision (i) would, under such construction, be bereft of all significance and might as well be stricken from the statute as redundant.

The learned court below considered that this provision of subdivision (i) "contemplates a situation where the corporation may have property outside the jurisdiction of the appointing court, in which case only part of its property could be in equity receivership without ancillary proceedings" (R., 21).

But if all that Congress meant was that the creditors might petition if an equity receivership existed in another jurisdiction, it would have been easy enough to say "if a receiver or trustee of the property of a corporation has been appointed in any jurisdiction by a federal, state or territorial court". Congress, however, did not say that.

It said "if a receiver or trustee of all or any part of the property of a corporation has been appointed by a federal; state or territorial court". The universality of the latter proposition, under the authorities already cited, cannot be limited to the narrow confines of the former. Certainly it cannot be so done without good reason. Besides, conservation suits are ordinarily commenced where the principal office of the corporation is situated, and so ordinarily are reorganization proceedings. The language in question can hardly be construed as having been adopted merely for the purpose of enabling creditors to institute the reorganization proceedings in a jurisdiction other than that in which the equity receivership or the conservation suit is pending.

POINT IV.

Judicial restriction of the meaning of the words "equity receivership" is contrary to the purposes of the act.

A. **This is a remedial statute requiring a liberal construction to accomplish the relief intended by Congress.**

The National Bankruptcy Act as a whole must be construed liberally. In *Continental Ill. Nat. B. & T. Co.* v. *C. R. I. & P. R. Co.* (1935) 294 U. S. 648, 668, 79 L. Ed. 642, 651, this Court in dealing with the companion § 77 said, per Sutherland, J.:

> "From the beginning, the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberalization in respect of the operation of the bankruptcy power."

The amendment which added § 77B was, of course, one of that group of statutes which were enacted to relieve business from the effects of the depression and to hasten economic recovery. It was thus peculiarly a remedial statute.

In dealing with § 77B, the Fourth Circuit Court of Appeals in *Campbell* v. *Allegheny Corporation* (1935) 75 Fed. [2d] 947, 950, said, per Parker, C. J.:

> "The statute is of a remedial character, designed to facilitate the reorganization of corporate business made necessary by the economic depression through which the country has been passing. Its purpose should be forwarded by a fair and liberal construction of its provisions, not thwarted by any narrow or technical interpretation, and certainly not by reading into its language conditions and limitations which the lawmakers themselves did not see fit to express."

B. **A purpose of the statute was to enable the debtor and its creditors to avoid, if possible, the sacrifice and expense involved in foreclosure sales.**

In upholding the constitutionality of the companion section, § 77, the Supreme Court in *Continental Ill. Nat. B. & T. Co.* v. *C. R. I. & P. R. Co.* (1935) 294 U. S. 648, 685, 79 L. Ed. 642, 660, said:

> "The delay and expense incident to railroad receiverships and foreclosure sales constituted, probably, the chief reasons which induced the passage of § 77; and to permit the perpetration of either of these evils under this new legislation would be subversive of the spirit in which it was conceived and adopted."

Something of the same thought with relation to § 77B was expressed by Judge Lindley in his decision in *In re Granada Hotel Corporation* (1935) 9 Fed. Supp. 909, which was affirmed by the Seventh Circuit Court of Appeals:

> "As the court has previously pointed out, the intent of Congress apparently was to give the holders of bonds in default an opportunity to have property securing their bonds reorganized in the federal court in lieu of liquidation under foreclosure in either the state or federal court."

If it was the intention of Congress to permit the holders of bonds in default to avoid the expense of foreclosure by

having their property reorganized under § 77B, *a fortiori* it was the right of general creditors, whose equities in a valuable property would be wiped out by the sale of the property under a small mortgage, to have the court assume jurisdiction, and thus to have an opportunity to seek to finance the mortgage and to prevent its foreclosure. This does not lead to any unjust, oppressive or absurd result. On the contrary, it affords an opportunity which is just, fair and reasonable.

The argument of the court below comes down to this, that an equity receivership of the entire property of the debtor is an "equity receivership" if the ultimate purpose of the suit is a ratable distribution of the assets among the creditors secured and unsecured, but is not an "equity receivership" if the ultimate object is the application of the property to the satisfaction of a secured creditor or, as often happens in the case of mortgage bonds, a class of secured creditors. Surely the legislature could not have intended that creditors could interrupt the course of a proceeding seeking a ratable distribution of the assets among all creditors, and could not interrupt the sacrifice of the property in the interest of one secured creditor or class of creditors.

POINT V.

The decision of the Seventh Circuit Court of Appeals rests upon a more logical basis.

The decision of the Second Circuit Court of Appeals below is exactly the opposite of the decision of the Seventh Circuit Court of Appeals in *In re Granada Hotel Corporation* (June 5, 1935), 78 Fed. [2d] 409, which affirmed the decision of the District Court for the Eastern District of Illinois (February 26, 1935) 9 Fed. Supp. 909. That case, which *sub nom. Tuttle v. Harris,* is also before this Court,

includes an additional question not involved here, i. e.; whether custody of the property under order of the court by a mortgage trustee, and not by a receiver selected by the court, constitutes a receivership.

The opinions both of the Circuit Court of Appeals and of the district court in that case give more emphasis to that feature of the controversy. They plainly show, however, that the instant question not only was necessarily decided but was considered by both courts. Indeed, in an application for rehearing to the Circuit Court of Appeals the decision below was urged as a reason for change in its decision. Rehearing, however, was denied on July 16, 1935.

The views of Judge Lindley, whose decision was affirmed, are clearly set forth in another case, *Matter of Surf Building Corporation* (D. C., E. D. Ill. 1934), 11 Fed. Supp. 295, where he said in part (p. 297):

> "It may be well to comment upon one or two contentions submitted by the respondents. It is insisted that an equity receivership, growing out of a foreclosure proceeding which vests in the receiver of a court of equity the custody and possession of all the assets of the corporation, is not an equity receivership within the meaning of the statute. I have already said in other cases, probably so often as justly to be accused of tiresome reiteration, that a receivership in equity is always incidental to some other ultimate purpose; that equity jurisprudence recognizes no such proceedings as one which has for its only prayer for relief, receivership, but that all receivers in equity are appointed, whether in dissolution of partnerships, in mortgage foreclosure or upon creditors' petition, in subordination of and incidental to the main purpose of the litigation. This court is of the opinion that Congress did not intend, by the provisions of 77-B, to limit jurisdiction under that section to equity receiverships other than those in foreclosure cases. To do so would be to defeat the purpose of the Act in a very important branch of equity jurisdiction."

Respondents below relied upon *In re Laclede Gas Light Co.* (D. C., E. D. Mo. June 26, 1934, not officially reported) C. C. H. Bankruptcy Law Service, Paragraph 3001. Certain remarks there are in accordance with the decision reached below. They were not at all necessary, however, to the decision, since in that case it appeared that no receiver whatever had been appointed at the time the petition for reorganization was filed. This also was the situation in *In re Broadway-Barclay Corporation* (2d C. C. A. July 15, 1935) 78 Fed. [2d] 680, decided by the court below simultaneously with its decision herein, and which reversed the decision of Judge Goddard. For the reason stated, these cases are plainly distinguishable.

The other decision in the District Court for the Southern District of New York, *In re Draco Realty Corporation* (June 3, 1935) 11 Fed. Supp. 405, was rendered after the decision in the District Court below and was, therefore, compelled by the rule *stare decisis*.

The decisions of Judge Lindley in *In re Flamingo Hotel Co.* (1934, not officially reported) C. C. H. Bankruptcy Law Service, Paragraph 3007, *In re Surf Building Corporation, supra,* and *In re Prairie Avenue Building Corporation* (1935) 11 Fed. Supp. 125, 128, support this brief.

CONCLUSION.

The literal and legal meaning of "equity receivership * * * pending" does not involve any particular ultimate relief. It is merely the description of a condition which may exist in many types of equity suits in which, pending ultimate disposition, the court has temporarily placed the property of the debtor in the hands of its custodian. Departure from the literal and legal meaning of "equity receivership * * * pending," in favor of a local, colloquial or otherwise restricted meaning can only be justified if adherence to the literal and legal meaning involves oppression, injustice or

absurdity. In the present case it is the restricted and colloquial meaning which involves injustice and absurdity, and the literal and legal meaning which is in accord with the purposes of the act, and with the liberal construction to which it is entitled as a remedial statute. The view of the Circuit Court of Appeals for the Seventh Circuit should be accepted.

The decisions of the Second Circuit Court of Appeals and of the District Court for the Southern District of New York should be reversed and the motions to dismiss the petition for reorganization denied.

Dated, New York, January 7, 1936.

Respectfully submitted,

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APPENDIX.

STATUTE.

The portions of § 77B of the National Bankruptcy Act as amended that are material are as follows:

> "(a) * * * Three or more creditors who have provable claims against any corporation which amount in the aggregate, in excess of the value of securities held by them, if any, to $1,000 or over may, if such corporation has not filed a petition or answer under this section, file with the court in which such corporation might file a petition under this section, a petition stating that such corporation is insolvent or unable to meet its debts as they mature and, if a prior proceeding in bankruptcy or equity receivership is not pending, that it has committed an act of bankruptcy within four months, that such creditors propose that it shall effect a reorganization; and such corporation shall, within ten days after the service of a copy of such petition upon it, answer such petition. * * *"

> "(i) If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State, or Territorial court, whether before or after June 7, 1934, at 12 o'clock noon a petition or answer may be filed under this section at any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section and if such petition or answer is approved, the trustee or trustees appointed under this section, or the debtor if no trustee is appointed, shall be entitled forthwith to possession of and vested with title to such property, and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver or prior trustee and for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said receiver or prior trustee. * * *"